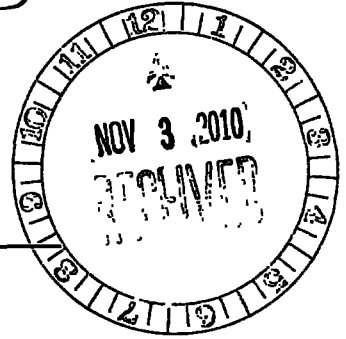


228/23

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



**FINANCE DOCKET NO. 35438**

**EIGHTEEN THIRTY GROUP, LLC – ACQUISITION EXEMPTION –  
LINE OF RAILROAD IN ALLEGANY COUNTY, MD**

**VERIFIED NOTICE OF EXEMPTION**

**COMMENTS OF LOIS LOWE**

**ENTERED  
Office of Proceedings  
NOV 3 - 2010  
Part of  
Public Record**

1. Notice is hereby given that Lois Lowe (“Lowe”), intends to participate as a party of record in this proceeding. Please direct all matters pertaining to this proceeding to: Lois Lowe; 1941 Greenspring Drive; Timonium, MD 21093. Telephone No.: (443) 226-5077.

2. On October 19, 2010, Eighteen Thirty Group LLC, (“1830”) filed a Verified Notice of Exemption (“NOE”) asking the Surface Transportation Board (“Board”) to grant 1830 an exemption, pursuant to 49 CFR 1150.31, from the requirements of 49 U.S.C. 10901.

3. I object to the NOE for the following reasons:

4. The Board has held in numerous proceedings, including every proceeding in which Riffin has filed a NOE, that if a proceeding is controversial, or becomes controversial, a NOE is inappropriate, for the time constraints associated with a NOE do not permit the development of a sufficient record.

5. Riffin will be involved in this proceeding. This proceeding will become (it already has become) highly controversial. Permitting this NOE to move forward would implicate Constitutional Equal Protection of the Laws concerns, and would implicate *New York Cross Harbor R.R. v. Surface Transp.*, 374 F.3d 1177, 1181(D.C. Cir. 2004).

6. NOE's which contain material misrepresentations are void *ab initio*.

7. The NOE contains the following material misrepresentations:

A. The Petitioners assert on p. 12 that "the proposed transaction is exempt from environmental review under 49 CFR §1105.6(c)(2)(i), because the actions proposed herein will not cause any operating changes that exceed the threshold established in 49 C.F.R. §1105.7(e)(4) or (5)."

a. On pp. 6 and 7, the Petitioners assert that this proceeding is related to three other proceedings currently before the Board, including Docket No. AB-55 (Sub-No. 659X).

b. In the Petition for Exemption the Eighteen Thirty Group, LLC filed in AB-55 (Sub-No. 659X), on p. 8, Eighteen Thirty Group avers "that the Line would restore service to about 10 initial customers generating about 450-500 cars per year of freight ... ."

c. On p. 6 of this proceeding, the Petitioners aver that the line is "about 8.54" long.

d. Dividing 450 cars per year by 8.54 miles of line equates to **52.69 carloads per mile per year, which EXCEEDS the 50 rail carloads per mile per year** specified in 49 C.F.R. §1105.7(e)(4)(iv)(B).

e. 49 C.F.R. §1105.7(e)(4)(iv) states:

(iv) "If the proposed action will cause diversions from rail to motor carriage of more than:

(A) 1,000 rail carloads a year; OR

(B) **An average of 50 rail carloads per mile per year for any part of the affected line**, quantify the resulting net change in energy consumption and show the date and methodology used to arrive at the figure given.

f. 49 CFR §1105.7(e)(5) states:

"(5) (i) If the proposed action will result in either:

"(A) An increase in rail traffic of at least 100 percent (measured in gross ton miles annually) or an increase of at least eight trains a day on any segment of rail

- line affected by the proposal, or
- (B) an increase in rail yard activity of at least 100 percent (measured by carload activity),
- (C) ... quantify the anticipated effect on air emissions. For a proposal under 49 U.S.C. 10901 (or 10505) to construct a new line or reinstitute service over a previously abandoned line, only the eight train a day provision in subsection (5)(i)(A) will apply.

g. Between March 2, 2006 and November 2, 2010, there has been no rail traffic over the 8.54 miles of Line the Petitioners propose to acquire and operate. Consequently, what Petitioners propose to do represents far more than a 100 percent increase in rail traffic not only on the Line, but also in rail yard activity. Since the Line has never been 'abandoned,' the 8 trains-per-day exception would not apply.

h. It was a material misrepresentation for the Petitioners to aver that this proceeding was exempt from the environmental requirements of 49 CFR 1105.

B. 49 CFR 1150.33(e)(1) states that a NOE must state "The name and address of the **railroad** transferring the subject property."

a. On p. 5 of the NOE, 1830 asserts that Riffin is the **railroad** that is "transferring the subject property."

b. In the Board's September 15, 2009 Decision in *James Riffin – Petition for Declaratory Order*, STB Finance Docket No.35245, the Board found that Riffin did not have "suitable legal interest" to be the common carrier on the Line that is the subject of this proceeding. The Board has defended this decision before the U.S. Court of Appeals, D.C. Circuit. Based on this finding by the Board, Riffin filed under Chapter 7 of the Bankruptcy Code.

c. If the Board were to accept as truthful 1830's representation that Riffin is the **railroad** transferring the subject property, then the Board would be judicially estopped from continuing to argue before the D.C. Circuit that Riffin is not a railroad.

C. On p.5 of the NOE, 1830 avers that it has reached an agreement with Riffin's Bankruptcy Trustee for the purchase of the **Line**, and further avers that the Trustee "asserts the bankruptcy estate is the owner of the equitable interest in the **Line** and that the trustee has the power to dispose of the **Line** subject to approval from the bankruptcy court."

a. If the Board accepts as truthful, 1830's representation that Riffin is the **railroad** that is transferring the Line, or that Riffin's Bankruptcy Trustee, as the Trustee of Riffin's Bankruptcy Estate, is the **railroad** that is transferring the Line, then the Board will have adopted a position that is diametrically opposed to the position the Board is asserting in the D.C. Circuit. (For the Line to be a part of Riffin's Bankruptcy Estate, it had to be **Riffin's** property as of the date Riffin filed for bankruptcy, January 20, 2010.) And if the Board accepts 1830's representation, then Riffin was a **railroad** on January 20, 2010, and as such, pursuant to 11 U.S.C. 109(b)(1), Riffin was **prohibited** from filing for Chapter 7. Consequently, the moment the Board accepts as truthful 1830's representation that Riffin is the railroad transferring the Line, Riffin's bankruptcy proceeding must be dismissed. In addition, the legal basis for the Board's position before the D.C. Circuit will have collapsed like a sand castle hit by the rising tide. And once Riffin's bankruptcy petition is dismissed, Riffin's Bankruptcy Trustee will lose all authority to transfer any of Riffin's property.

b. 1830 and the Board are fully aware of Riffin's bankruptcy proceeding, including Riffin's Schedules of Real and Personal property, Exemptions, and Adversary Proceeding 10-602. The Petitioners and their attorney, are also fully aware that CSX deeded the Line to WMS L.L.C., a Maryland limited liability company, that WMS L.L.C. has not filed for bankruptcy, that Riffin has conveyed 96% of his interest in the track material and right-of-way to other parties,<sup>1</sup> prior to his filing for bankruptcy, and that the only thing that is / was a part of Riffin's bankruptcy estate was the 4% interest Riffin retained in the track material and right-of-way. The Petitioners are also fully aware that the only thing that is in Riffin's bankruptcy estate is his 4%

---

<sup>1</sup> 35% to me; 15% to Eric Strohmeyer; 30% to Zandra Rudo; 16% to Carl Delmont. On January 5, 2010, I acquired Carl Delmont's 16% interest. I now own and control 51% of WMS LLC, Western Maryland Services LLC, and have an undivided 51% interest in the track material and real estate comprising the right-of-way. Since I have the controlling interest, only I can speak for WMS LLC and Western Maryland Services LLC.

interest in WMS L.L.C., and thus the only thing that potentially can be conveyed by Riffin's Bankruptcy Trustee is Riffin's 4% interest in WMS LLC, **not the Line** or the "track and right of way." The Petitioners are also fully aware that Riffin has exempted his 4% interest in WMS LLC, and thus Riffin's 4% interest **is no longer a part of Riffin's bankruptcy estate.**

c. The only reason Riffin's bankruptcy proceeding has been permitted to proceed, is because the Board has held that Riffin did not have 'suitable legal interest' in the Line to be the common carrier on the Line. If the Board were to grant this NOE, the Board would tacitly be admitting that Riffin does in fact have, and has had, the common carrier obligations associated with the Line. And the moment that the Board admits that Riffin has the common carrier obligations associated with the Line, Riffin's bankruptcy proceeding will have to be dismissed. And if Riffin's bankruptcy proceeding is dismissed due to Riffin being a railroad *ab initio*, there will no longer be a Riffin's Bankruptcy Estate or Trustee.

D. In light of the Board's September 15, 2009 decision in FD 35245, it was a material misrepresentation for 1830 to represent that Riffin, or that Riffin's Bankruptcy Trustee, would be the railroad transferring the Line.

E. It was a material misrepresentation for 1830 not to disclose the infirmities associated with title to the Line.

F. It was a material misrepresentation for 1830 to represent that Riffin's Bankruptcy Trustee could convey the common carrier obligations associated with the Line.

8. The 1830 Group represented to the Board that the Line was a part of Riffin's bankruptcy estate. For the Line to be a part of Riffin's bankruptcy estate, it first must have been Riffin's property. This representation by 1830 is diametrically opposed to the Board's September 15, 2009 Decision in FD 35245.

9. In a March 5, 2009 decision in *James Riffin – Acquisition and Operation Exemption – Veneer Mfg. Co. Spur – Located in Baltimore County, MD*, Finance Docket No. 35221, the STB rejected Riffin's NOE because he failed to indicate who was the transferor of the line.

Having established this precedent, the Board must likewise reject 1830's NOE, due to its failure to state the **railroad** that would be transferring the Line.

10. WMS L.L.C., a Maryland limited liability company, has never sought, nor acquired, authority to acquire and operate the Line that is the subject of this proceeding.

11. Western Maryland Services L.L.C., a West Virginia limited liability company, on December 14, 2005, received authority to acquire and operate the Line. **This authority was based on the financial statements of the original investors.** On p. 3 of 1830's Petition for Exemption from the provisions of 49 U.S.C. 10904(f)(4)(A), Docket No. AB-55 (Sub-No. 659X), 1830 averred the following:

**“The financing that WMS LLC had originally sought in connection with this transaction failed to materialize and its promoters turned to an investor named James Riffin.”**

12. In Petition for Review 10-1150, D.C. Circuit, the Board argued for Summary Affirmance of the Board's decision exempting the proceeding from the Board's OFA procedures. In support of its Motion for Summary Affirmance, the Board argued that the Offerors (Riffin and Strohmeier) (1) have a duty to provide the Board with updated financial statements; (2) no longer are 'financially responsible' due to Riffin filing for bankruptcy; and (3) if any entity that was financially responsible when an OFA was submitted, subsequently no longer is financially responsible, then the entity's OFA is rendered moot.

13. 1830's attorney, John Heffner, who also represented Western Maryland Services LLC, averred that “The financing that WMS LLC had originally sought in connection with this transaction failed to materialize.” Pursuant to the Board's argument before the D.C. Circuit, Western Maryland Services' attorney, John Heffner, had a obligation to inform the Board about this loss of financial responsibility, and the Board had a duty to declare Western Maryland Services' OFA moot when Western Maryland Services never acquired substitute financing. [Western Maryland Services never acquired substitute financing. Riffin, who was found to be financially responsible in his own right, was substituted as the offeror. See November 2, 2010 Affidavit of James Riffin.]

14. If the Board finds that Western Maryland Services' OFA was still viable after it lost its financial backing, Riffin will apprise the D.C. Circuit of this change in the Board's position regarding financial responsibility.

15. Mr. Heffner misrepresented to the Board that he can represent Mssrs. Smith and Altizer, and the Eighteen Thirty Group LLC and Georges Creek Railway LLC.

A. Mr. Heffner was the counsel of record for Western Maryland Services LLC, a West Virginia limited liability company, 98% of which was owned by Riffin; for WMS LLC, a Maryland limited liability company, 100% of which was owned by Riffin; and for James Riffin, in the AB 55 (Sub-No. 659X) proceeding.

B. Riffin paid Mr. Heffner's \$2,500.00 retainer fee in September, 2005.

C. 49 CFR 1103.16(b) states:

“(b) It is unethical for a practitioner to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this section, a practitioner represents conflicting interest, when on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

(c) The obligation to represent the client with undivided fidelity and not to divulge secrets or confidence forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.”

D. The parties Mr. Heffner is attempting to represent, have a desire to divest Riffin of his common carrier obligations in the Line, and to divest Riffin and parties Riffin has contracted with, of his and their title and interest to the track material and right-of-way associated with the Line.

E. There is a high probability that Mr. Heffner will be called as a witness in an adversary proceeding in Riffin's bankruptcy proceeding. Were Mr. Heffner to represent the parties in this proceeding, he could potentially invoke attorney / client privilege to refuse to testify, or to

respond to discovery requests. He also could potentially disclose privileged information to those parties, whose interests are adverse to Riffin's interests.

F. Neither I nor WMS LLC nor Western Maryland Services have given their consent for Mr. Heffner to represent Mssrs. Smith, Altizer, the Eighteen Thirty Group LLC or Georges Creek Railway LLC., nor will I, individually, or as the controlling member of WMS LLC and Western Maryland Services LLC, grant such consent.

8. WHEREFORE, for the foregoing reasons, I pray that the Board:

A. Reject the NOE, as controversial;

B. Deny the NOE, due to 1830's environmental misrepresentations, and / or

C. **EITHER** deny the NOE due to 1830's misrepresentation that the railroad transferring the Line will be Riffin, or in the alternative, Riffin's Bankruptcy Trustee; **OR** accept as truthful 1830's representation that Riffin is the railroad that will be transferring the Line;

D. Order Mr. Heffner to cease representing Mssrs. Smith, Altizer, the Eighteen Thirty Group LLC and Georges Creek Railway LLC, in any matter that relates in any way to WMS LLC, to Western Maryland Services LLC, or to the Line of railroad involved in the AB 55 (Sub-No. 659X) proceeding.

E. And for such other and further relief as would be appropriate.

Respectfully,



Lois Lowe  
1941 Greenspring Drive  
Timonium, MD 21093  
(443) 226-5077



### **CERTIFICATE OF SERVICE**

I hereby certify that on the 3<sup>rd</sup> Day of November, 2010, a copy of the foregoing Comments of Lois Lowe were mailed via first class mail, postage prepaid, to: John Heffner, Ste 200, 1750 K Street NW, Washington, DC 20006 (202) 296-3333; and was hand delivered or mailed to the U.S. Trustee, 2<sup>nd</sup> Floor, 101 W. Lombard St., Baltimore, MD 21201; to Duncan Smith, 10706 Beaver Dam Road, Cockeysville, MD 21030; and to Mark Friedman, DLA Piper, 6225 Smith Ave, Baltimore, MD 21209.

  
Lois Lowe

**NOVEMBER 2, 2010 AFFIDAVIT OF LOIS LOWE**

1. My name is Lois Lowe. I am over the age of 21. I am competent and authorized to make this Affidavit.

2. On January 5, 2009, a 35% interest in the track and right-of-way of the Line that was the subject of AB-55 (Sub. No. 659X) ("Line"), whether held by WMS LLC, Western Maryland Services LLC or James Riffin, was transferred to me. On April 24, 2009, a 16% interest in the track and right-of-way of the Line, whether held by WMS LLC, Western Maryland Services LLC or James Riffin, was transferred to Carl Delmont. On January 5, 2010, Carl Delmont transferred his 16% interest in the track and right-of-way of the Line, whether held by WMS LLC, Western Maryland Services LLC or James Riffin, to me. I now have the controlling interest (51%) in WMS LLC, in Western Maryland Services LLC, and now have an undivided 51% in the track material and right-of-way associated with the Line.

3. I did not acquire any of the common carrier obligations associated with the Line.

4. I affirm under the penalties of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on: November 2, 2010

  
Lois Lowe  
Affiant